

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11520-RWZ

SETH RESNICK, *et al.*

v.

COPYRIGHT CLEARANCE CENTER, INC.

MEMORANDUM OF DECISION

September 22, 2003

ZOBEL, D.J.

Freelance photographers Seth Resnick, Paula Lerner and Michael Grecco are suing Copyright Clearance Center, Inc. ("CCC"), for copyright infringement. Defendant is a corporation that acts as an agent for publishers by granting licenses to thousands of businesses, academic institutions, libraries, and other entities for the photocopying of magazine articles. The CCC and publishers enter into agency agreements that include a representation and warranty that the publishers own sufficient intellectual property rights to grant photocopy authorization.¹ Licensees pay the CCC for photocopying rights, and the CCC in turn distributes a portion of the licensing revenue to publishers. In their First Amended Complaint, plaintiffs allege that when they sell a photograph to a magazine, they typically grant a limited license for the use of the image and retain all rights beyond the one-time publication. By granting its customers licenses to photocopy images without obtaining the permission of the photographers who own them, CCC is

¹ Some publications, such as Newsweek and Forbes, do not allow the CCC to authorize reproduction of photographs.

alleged to have infringed plaintiffs' copyrights. Plaintiffs now bring a motion under Fed.

R. Civ. P. 23 to certify the following class:

all persons and/or entities who own or are the holders of a registered copyright in at least one photographic image ("Images") that was created and first published after January 1, 1978, and appeared in a publication contained in the database of over 1.75 million publications listed with [CCC], which, without the holder's permission or prior authorization, was copied, licensed or sold by CCC, and/or CCC granted permission or authorization, in consideration of a fee, to others to copy such Images.

Before a class action may be certified, plaintiffs must prove that they satisfy all four requirements of Fed. R. Civ. P. 23(a), plus one of three conditions under Rule 23(b). Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614 (1997); Makuc v. American Honda Motor Co., Inc., 835 F.2d 389, 394 (1st Cir. 1987) ("The plaintiff has the burden of showing that all the prerequisites for a class action have been met.").

Pursuant to Rule 23(a), class certification is proper only if

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

In order to satisfy the numerosity requirement, plaintiffs must show that it is impracticable to join all photographers who have sold their copyright-registered images to CCC-affiliated publications under limited licenses, thereby retaining the exclusive right to reproduce their own work. Citing deposition testimony by the former executive director of the American Society of Magazine Photographers ("ASMP"), plaintiffs estimate that there are "roughly 20,000" freelancers working in the United States. Additionally, plaintiffs state that freelancers "typically only license limited use of their

product.” Plaintiffs’ Memorandum in Support of Their Motion for Class Certification, p. 6. The primary evidence for this proposition is plaintiff Seth Resnick’s declaration that “[t]he standard practice in the industry is for freelance photographers to own the copyright in their photographic images” and excerpts from two ASMP manuals that suggest the same. Such bare assertions do not begin to address the question of how many photographers grant limited licenses to publishers that do not include photocopying rights. The record provides little basis for this Court to determine whether joinder of all class members is impracticable or, for that matter, whether the limited licenses granted by plaintiffs are typical of the class. See Fed. R. Civ. P. 23(a)(3).

Accordingly, plaintiffs’ Motion for Class Certification is denied.

DATE

RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE